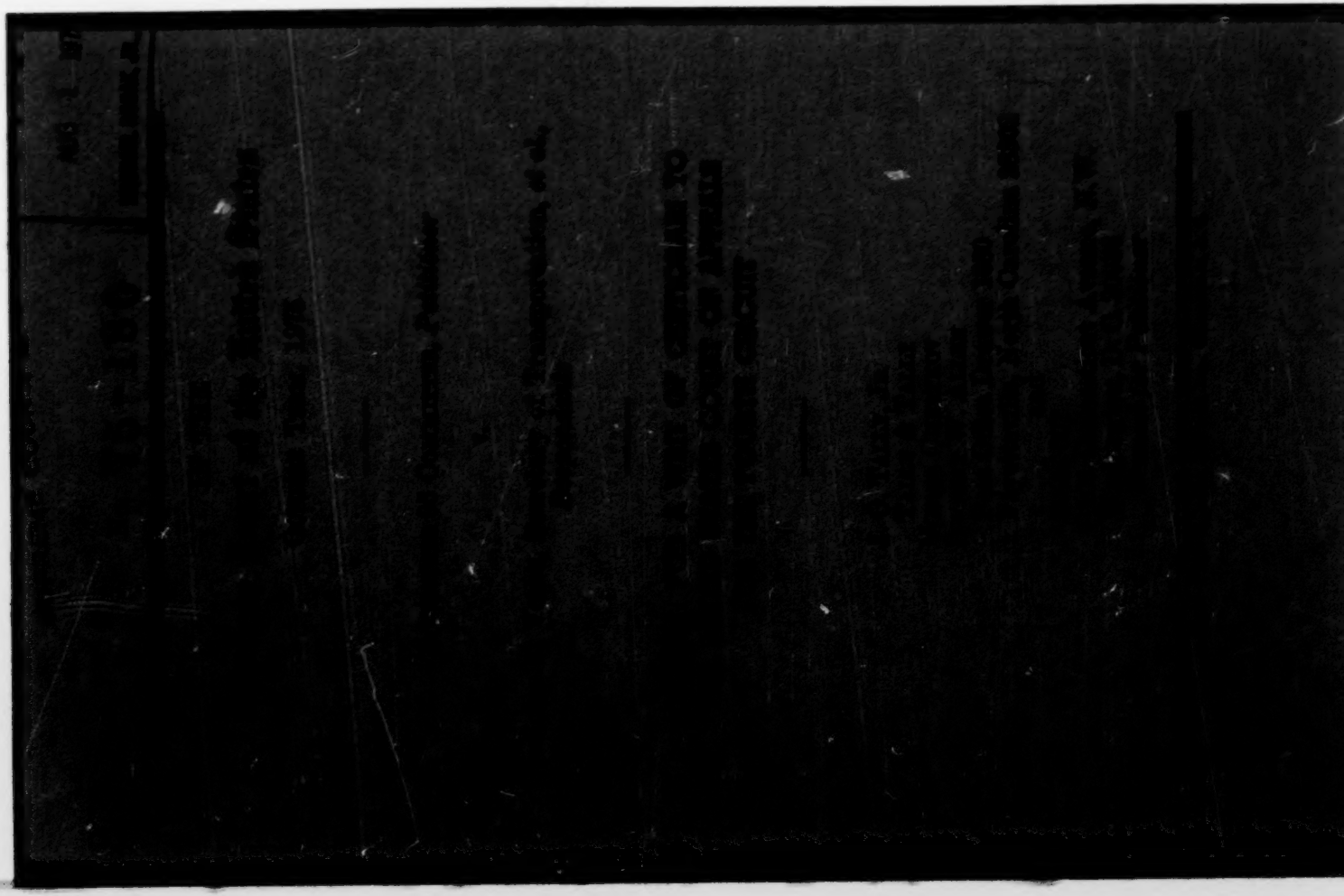

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERSTATE 95 COMMITTEE, *Petitioner*

v.

JOHN A. VOLPE, Secretary of Transportation, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Interstate 95 Committee petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-12a) is not yet reported. The opinion of the dis-

[1] Respondents are the United States Department of Transportation, the Federal Highway Administration, the State Highway Commission of North Carolina, and the several heads of these agencies in their official capacities. The State Highway Commission supported the federal parties below.

trict court is reported at 386 F. Supp. 572 (App. C, *infra,* pp. 14a-22a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 13a) was entered on May 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) expressly directs that all agencies of the federal government shall include in every recommendation or report on major federal actions significantly affecting the quality of the human environment a detailed statement "by the responsible official" on the environmental impact of the proposed action (42 U.S.C. 4332(2)(C)). This section also directs that such statement shall include the "alternatives" to such action. Still another statute, the Federal-Aid Highways Act, provides that a state's request for approval of a highway project must show the consideration given "various alternatives which were raised during the hearing, *or which were otherwise considered*" (23 U.S.C. 128(a), emphasis added).

1. Whether NEPA's express requirement of environmental impact statements "by the responsible [federal] official" is satisfied where the preparation of such statements in connection with highway projects is delegated to applicant state highway agencies subject to guidelines, review and acceptance by the responsible federal official.

This question is on all-fours with the first question raised in the pending federal government petition for

certiorari No. 74-1413, *William T. Coleman, Jr., Secretary of Transportation* v. *The Conservation Society of Southern Vermont.*

2. Whether, under the express requirements of NEPA and the Federal-Aid Highways Act that alternatives must be considered and reported, federal approval of a highway project is sustainable where the federal officials accepted the final environmental impact statement and approved the project *without notice that prior to these actions* the State Highway Commission had actively considered and documented an apparently plausible, viable intermediate route as an alternative to the two routes that were reported and from which the selection was made.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the National Environmental Policy Act of 1969, and the Federal-Aid Highways Act are set out in Appendix D, *infra,* pp. 23a-24a.

STATEMENT

The Federal-Aid Highways Act provides for a national system of interstate highways, with 90 percent of the cost to be borne by the federal government. While the states select, design and construct the highways, the commitment of federal funds is dependent on prior approval of each project by the Department of Transportation. Involved here is the largely completed I-95 which stretches from Maine to Florida and leads to many well known summer and winter resorts. I-95 has for some time been completed to the north and south approaches to Fayetteville, North Carolina. There, it links up at each end with four-laned U.S. Highway 301 which has long served as the principal

artery of travel to, from and beyond Fayetteville. Through the years a large number of tourist-oriented businesses, comprising the second largest industry in Fayetteville, grew up around U.S. Highway 301. The battle lines formed over the question of whether I-95 should be completed through the city by upgrading U.S. Highway 301 to interstate road standards, or should bypass the city altogether. The petitioner, Interstate 95 Committee, is an association of some eighty businessmen whose establishments cater to the tourist trade. These businessmen banded together to oppose bypassing the city which they believed would destroy their investments, cause serious unemployment, endanger the city's vital tax base, and increase city sprawl.

Petitioner's view did not prevail at the administrative level, as on two separate occasions the state recommended, and the Department of Transportation approved, a by-pass route some five miles outside Fayetteville's limits. The first time, after the district court gave summary judgment for the Department of Transportation, the Fourth Circuit Court of Appeals remanded the case for lack of an environmental impact statement and a public hearing on the social and environmental consequences of the proposed action (463 F.2d 402). While the district court held the case, the State Highway Commission busied itself with the preparation of environmental statements pursuant to federal Policy and Procedure Memorandum (PPM) 90-1 (37 Fed. Reg. 21809-21816). PPM 90-1 was issued by the Department of Transportation to carry out, in what it considered a legitimate and feasible way, NEPA's requirement of environmental statements "by the responsible [federal] official" (42

U.S.C. 4332(2)(C), App. D, *infra,* p. 23a). While delegating the task of actual preparation of the statements to applicant state highway officials, the regulation sets out guidelines for incorporating the relevant environmental considerations and provides for consultation with federal highway officials. The regulation calls for, first, the preparation by the state of a draft statement which is to be widely circulated for comment and review by federal highway officials. This is to be followed by a revision (again by the state) of the draft statement in light of the comments and reviews into a final statement. This final statement has to be submitted to the Department of Transportation for its acceptance. The State Highway Commission here prepared and circulated a draft statement pursuant to the regulation, held the required public hearing on July 16, 1973, and thereafter prepared a final statement which was accepted by the Department of Transportation on September 17, 1973. Then on October 5, 1973, the state again requested federal approval of the by-pass route pursuant to the provisions of the Federal-Aid Highways Act (23 U.S.C. 128(a), App. D, *infra,* p. 24a). The approval was granted on October 24, 1973. Thereafter, the district court gave summary judgment for the Department of Transportation and the court of appeals affirmed.

Before turning to a summary of those decisions, we adduce the following additional facts which form the basis for the second question here presented in respect to the provisions of both NEPA and the Federal-Aid Highways Act that *alternatives* to recommended actions must be considered and reported (42 U.S.C. 4332 (2)(C)(iii); 23 U.S.C. 128(a), App. D, *infra,* pp.

23a-24a). Just as it had done prior to remand, the State Highway Commission (at the public hearing, in its prepared environmental statements and in its request for approval of the by-pass) considered only the same two routes—the by-pass and U.S. Highway 301. *Unbeknown* to the Department of Transportation when it accepted the final environmental statement on September 17, 1973, or when it finally approved the by-pass on October 24, 1973, was the fact that the State Highway Commission had considered an apparently plausible, viable in-between route which was proposed to save Fayetteville's tourist industry and eliminate the dangers of sprawl. The consideration of this intermediate route was evidenced by an internal memorandum of the State Highway Commission which analyzed in considerable detail its advantages and disadvantages *vis a vis* the other two routes and recommended against it (App. E, *infra,* pp. 25a-29a). This detailed memorandum, while dated September 21, 1973, indicates in the first paragraph that the proposal was before the state certainly as early as September 5, 1973. Our offer of proof that the proposal was submitted even *before* the hearing on July 16, 1973, was not allowed (App. C, *infra,* p. 20a, n. 4).

1. The district court rejected our contention that allowing the State Highway Commission to prepare the environmental statement was an impermissible delegation of a federal responsibility expressly decreed in NEPA (42 U.S.C. 4332(2)(C), App. D, *infra,* p. 23a). While acknowledging that our position was supported by decisions in the Second Circuit, the court nevertheless preferred the view expressed in other circuits that where, as it found here, a state agency prepares the statement pursuant to federal guidelines and federal participation is evidenced by consultation and

good faith review and acceptance of the statement, the delegation is permissible (App. C, *infra,* pp. 17a-18a).[2] In a more elaborate opinion, citing its own previous decision as well as similar appellate decisions in the eighth, ninth and tenth circuits, the court of appeals affirmed the district court's ruling and its rationale (App. A, *infra,* pp. 5a-9a).

2. On the issue of the state's failure to disclose its consideration of the proposed intermediate route and the federal approval of the by-pass in ignorance of such a proposal, the district court saw no violation of either NEPA or the Federal-Aid Highways Act. It held that the requirements of both of these statutes as to consideration and reporting of alternatives were alike subject to a construction of reasonableness and that looking at the state's analysis of the intermediate route proposal, *regardless of when it was first received and considered,* the reporting of it either in the environmental statement or the request for approval of the by-pass "could in no way have altered the conclusion" (App. C, *infra,* pp. 20a). The court of appeals affirmed on essentially the same grounds, likewise basing its assessment of the reasonableness of the proposal entirely on the analysis and conclusions contained in the state's memorandum (App. A, *infra,* pp. 9a-12a).

REASONS FOR GRANTING CERTIORARI

NEPA is a major statute applicable not only to the Department of Transportation with its heavy involve-

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[2] Additionally, we unsuccessfully contended in both courts below that federal review and acceptance here were hardly more than a rubber-stamp operation. We realize that such a factual issue is not a good candidate for certiorari and therefore do not raise it here.

ment in highway construction projects, but to every federal agency whose actions have a significant effect upon the environment (App. D, *infra*, p. 23a). Thus, NEPA is not the exclusive statute of a single agency whose construction and implementation would normally be accorded due respect by the courts, but is rather a piece of legislation whose essential provisions call for construction befitting its wide coverage and broad perspective.

At the base of NEPA stands the express requirement of an environmental impact statement "by the responsible [federal] official." Of obvious critical importance is the question whether this requirement means that the responsible federal agencies *must actually prepare* the statement and cannot delegate preparation to applicants who seek federal subsidies and approval of projects, even though the delegation is subject to guidelines, review and acceptance of the statement. Specifically, here, the question is whether such a delegation is permissible to states seeking approval of highway construction projects. This important question presses for resolution by this Court because of an irreconcilable conflict among the circuits. As previously noted, there is a pending petition for certiorari by the federal government on precisely the same question (No. 74-1413, *William T. Coleman, Jr., Secretary of Transportation* v. *The Conservation Society of Southern Vermont*). We, of course, are on the opposite side of the fence as to how this question should be resolved on the merits.[2]

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[2] There is pending legislation in Congress aimed at resolving this issue. We will advise the Court of any outcome that might affect this petition.

1. The Courts of Appeal in Five Circuits Permit Delegations While in Two Circuits They Are Against.

In addition to the instant case, the courts of appeals in four other circuits have approved delegation of the task of preparing environmental statements for highway construction projects to state agencies where the preparation was done under federal guidelines and federal participation was evidenced by consultation, review and acceptance of the statement. *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe*, 487 F.2d 849 (8th Cir.); *Citizens Environmental Council* v. *Volpe*, 484 F.2d 870 (10th Cir.); *Finish Allatoona's Interstate Right, Inc.* v. *Brinegar*, 484 F.2d 638 (5th Cir.); *Life of the Land* v. *Brinegar*, 485 F.2d 460 (9th Cir.).

The decisions of the courts of appeals in the second and seventh circuits, however, stand in clear and firm disagreement with that view. In *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F.2d 927, 931-33 (2nd Cir.),[4] the court adopted the stringent rule that the responsible federal official had a *nondelegable duty to prepare* the environmental statement, and that this meant that while he need not ignore previous work by the state authorities, the primary responsibility for research and writing was his alone. The court believed that this "unambiguous rule" best fits the express language and purpose of NEPA and has the advantage of rendering unnecessary the substantial amount of litigation raging over the adequacy of federal participation and charges of state bias. The court of appeals for the seventh circuit has adopted the very same stringent rule and rationale

[4] See also, *Greene County Planning Board* v. *F.P.C.*, 455 F. 2d 412 (2nd Cir.); *Steubing* v. *Brinegar*, 511 F. 2d 489, 496 (2nd Cir.); *I-291 Why? Association* v. *Burns*, 2d Cir., No. 473, decided May 30, 1975, affirming 372 F.Supp. 223.

(*Swain* v. *Brinegar,* No. 74-1625, decided April 29, 1975; 7 ERC 2046, 2052-54).[5]

We submit that although in the minority, the position of the second and seventh circuits is the correct one. None of the majority decisions denies that NEPA's requirement of an environmental impact statement is addressed to, and is the responsibility of, federal officials. They fail to make clear, however, just how they get from there to a permissible delgation to state agencies of the responsibility to *prepare* the statement. What might be a fair articulation of the majority's position is found on p. 14 of the federal government's pending petition for certiorari on this issue (No. 74-1413). It is there argued that, "Issuance of an adequate statement is a federal responsibility but it, like many other responsibilities ultimately resting with particular officials, can be assigned in the first instance to others more intimately acquainted with the project and more advantageously placed to collect and assess the requisite information."

We believe that *Swain* v. *Brinegar, supra,* effectively refutes the argument that NEPA merely requires the responsible federal official to *provide* rather than *prepare* the statement. The court there points out that after requiring "a detailed statement by the responsible official," NEPA goes on to say that "prior to making any detailed statement, the responsible Federal official shall consult . . . and obtain . . . comments. . . ." Thus, the court concludes, "Clearly the act contemplates the EIS being prepared by the

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[5] The opinion in this case is reproduced in Appendix E, pp. 83a-115a, of the federal government's pending petition for certiorari, No. 74-1413.

federal official in the first instance," and no administrative interpretation or regulation to the contrary can be allowed to prevail (7 ERC 2053, N. 14). As to the argument that state authorities are "more advantageously placed to collect and assess the requisite information," we suggest that it is quite a superficial view. On the contrary, as the court in *Swain* v. *Brinegar* sees it, "State agencies quite properly look first to the interests of their own state; this is inherent in the design of a federal union. And such agencies are subject to political pressures which can often make detached evaluation of their own projects quite difficult. The result is that state drafted impact statements may slight or completely ignore essential national concerns, and these deficiencies may successfully be masked by use of general, nonspecific language within the EIS itself." (7 ERC 2054). We would add that even if we eliminate the thought of politics or narrowness or bad faith on the part of state authorities, review of an environmental statement, whose preparation requires so much detailed and sophisticated research and balanced assessments, can never serve as a substitute for preparation. And if one believes, as we think he must, that the language and thrust of NEPA demand truly meaningful and effective involvement of the federal government, the delegation question requires an answer in the negative.

2. The Application of the "Rule of Reasonableness" to the Related Issue of the State's Failure To Report Its Consideration of the Intermediate Route Constitutes an Unwarranted Extension of that Rule and Is Not in Accord with Decisions in Other Circuits.

The holding below letting stand the approval of the by-pass in absence of notice to federal authorities that the state had considered a third alternative route also warrants review. The facts pertinent to this issue are stated on p. 5 hereof. The state's memorandum showing a detailed consideration of the intermediate route is reproduced in App. E, *infra,* pp. 25a-29a. NEPA expressly requires that the environmental statement contain a consideration of *alternatives* to any proposed action (42 U.S.C. 4332(2)(C)(iii), App. D, *infra,* p. 23a). This requirement has been called "the linchpin of the entire statement."[6] Lending further weight to the importance of consideration of alternatives is still another major statute, the Federal-Aid Highways Act, which likewise requires that alternatives be considered and reported in a state's request for approval if a highway project (23 U.S.C. 128(a), App. D, *infra,* p. 24a). Yet in the face of these clear and stringent statutory requirements the state did not report, either in the environmental statement, or in its request for approval, that it had considered a third alternative route. And without any knowledge of that fact, the Deparment of Transportation proceeded to accept the environmental statement and subsequently approved the by-pass route.

Both the district court and the court of appeals applied the "rule of reasonableness" to decide the is-

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[6] *Monroe County Conservation Council* v. *Volpe,* 472 F. 2d 693, 697-8 (2nd Cir. 1972).

sue. The district court quoted from *Life of the Land* v. *Brinegar,* 485 F.2d 460, 472, that "there is no need for an EIS to consider an alternative whose effect cannot be reasonably acertained, and whose implementation is deemed remote and speculative" (App. C, *infra,* p. 20a). The court of appeals quoted from *Movement Against Destruction* v. *Volpe,* 361 F. Supp. 1360, 1388, that NEPA only demands "realistic alternatives that will be reasonably available within the time the decision making official intends to act" (App. A, *infra,* p. 11a). Nowhere, however, does either court proceed to show just what was unrealistic, remote, speculative, or untimely about the alternative proposal here. On the contrary, by the state's own analysis the proposed intermediate route was more "realistic" than U.S. Route 301 which lost out to the by-pass after extensive consideration in the environmental statement, as it was shown to have six advantages and only two disadvantages *vis a vis* U.S. Route 301. Or to put it another way, if the proposed intermediate route had from the beginning been the only rival of the by-pass, it surely could not have been left out of consideration in the environmental statement. As for timeliness, our offer of proof that the intermediate route proposal was submitted to the state even *before* the public hearing on July 16, 1973, was not allowed, the district court holding that in the view it was taking of the matter, the time was of no importance (App. C, *infra,* p. 20a, note 4). The court of appeals indulged in "a fair assumption" that the proposal was received "in the first few days in September [1973]" (App. A, *infra,* p. 10a). Even if this "fair assumption" is accepted, it would make it about two weeks *before* the environmental statement was accepted on September 17, about four weeks *before* the state submitted its request for

approval of the by-pass on October 5, and about seven weeks *before* the approval of the by-pass on October 24. And if our offer of proof had been granted, the time of the submission of the proposal might have been established as even *before* the final environmental statement was in the process of preparation by the state. In either circumstance, there was time enough to notify the federal government before it committed itself. Indeed, compliance with NEPA demands "that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

We submit that there has here been an unwarranted extension of the "rule of reasonableness," in that it appears not to have been applied to the realism or timeliness of the proposed alternative but to the likelihood of its approval by the Secretary of Transportation. First, the state apparently decided that the Secretary of Transportation would not go for the suggested intermediate route and therefore did not report it, and then the court of appeals decided that "it was quite within the bounds of reason for the suggestion not to be reported to the federal highway authorities" (App. A, *infra*, p. 12a). Thus, the Secretary of Transportation was deprived of his need and right to know under both NEPA and the Federal-Aid Highways Act. What the Secretary *might* decide is not for a state, or normally for a court, to decide. The province of a court is to review for arbitrariness or unlawfulness what-

ever decision the Secretary actually makes. *Sierra Club* v. *Morton,* ——— F.2d —— (D.C. Cir. 1975), 7 ERC 1977, 1990, N. 29. As the district court put it in a similar situation in *I-291 Why Association* v. *Burns,* 372 F. Supp. 223, 252-3; aff'd. 2nd Cir. No. 478, May 30, 1975:

> "Rather than inform federal decision makers, by objectively listing the alternatives facing them regarding I-291 and supplying facts sufficient for them to judge the merits of each alternative, the EIS usurps the Secretary's decision making role by framing its discussions of alternatives so that, based on the EIS alone, only one decision is possible—to proceed with I-291 as presently planned. Thus the EIS caters to just the sort of tendentious decision making that NEPA seeks to avoid."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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